

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION**

FIRST APPEAL NO.667 OF 1994

1) Kishinchand Jawarmal Sachanandani deceased by his legal heirs :- 2) Mrs. Radhibai Kishinchand Sachanandani since deceased through legal heirs being Appellant No.2 Residing at 36, Colombia Building, St. Dominic Road, Bandra (West), Bombay-400 050.	...Appellant
Versus	
Jawari Lachmandas Agicha Residing at Flat on 2 nd floor, Agicha House, situated at Plot No.18/8, Rafi Ahmed Kidwai Road, Bombay- 400 031.	...Respondent

...

Mr. Sheroor P. Kanuga a/w Ms Minal Chandnani for the Appellant.
Mr. P.V. Nichani aw/ Ms Sayali Puri a/w Mr. Vikas Kumbhar i/b. M/s.
P.V. Nichani and Co. for the Respondent No.4.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 28th FEBRUARY, 2020.

JUDGMENT:-

This is an appeal filed under Section 96 of the Civil Procedure Code challenging the judgment and decree dated 11/01/1994 whereby the learned Judge dismissed the suit No.1565 of 1985, filed by the Appellant/Plaintiff.

2. The Appellant was the Plaintiff and the Respondents were the Defendants in the Suit and shall be hereinafter referred to as the Plaintiff and the Defendants respectively.

3. The dispute is in respect of a terrace appurtenant to the flat situated on the third floor of Agicha House, Plot No.18/8, Rafi Ahmed Kidwai Road, Bombay, 400 031. The said flat shall be referred to as the suit flat whereas the terrace appurtenant thereto shall be referred to as the suit terrace.

4. It is the case of the Plaintiff that under a registered document dated 04/09/1978 he had purchased the suit flat alongwith the suit terrace for sale consideration of Rs.87,500/-. There are two doors leading to the suit terrace i.e. one from the passage outside the suit flat and the other from the landing near the staircase. The suit flat as well as the suit terrace have been delineated in red line in the plan annexed to the registered document at Exhibit-A.

5. The Plaintiff claims that he has been in exclusive possession of the suit terrace since 1978. The Plaintiff has averred that the

windows of the bedroom and the passage open into the suit terrace and that use of the suit terrace by a third person would invade his privacy. The Plaintiff claims that he had decided to put a temporary monsoon shed over the suit terrace. The grievance of the Plaintiff is that the Defendants prevented him from bringing asbestos sheets and other construction material on the suit terrace. It is further alleged that the Defendant with the help of his employees removed the outer door of the suit terrace. The Plaintiff claims that with the assistance of the police he has covered the outer door by putting a wooden plank. He contends that the Defendants have no right to enter the suit terrace and or to obstruct him from using the suit terrace. The Plaintiff therefore filed a suit for permanent injunction seeking to restrain the Defendants from entering into the terrace and /or obstructing him from putting up a monsoon shed on the suit terrace. The Plaintiff has also sought to direct the Defendants to restore the outer door of the terrace and in the alternative to permit him to put a new door.

6. It is the case of the Defendants that under the document at Exhibit-A late Lachmandas sold to the Plaintiff the suit flat admeasuring 800 sq.ft. for sale consideration of Rs.87,500/-. They have denied that the Plaintiff was sold the suit terrace appurtenant to

the suit flat and have claimed that the owner has reserved the right to develop the terrace. The Defendants have also denied that the suit flat and the suit terrace were delineated in the plan annexed to the document at Exhibit-A. These Defendants have alleged that the Plaintiff had obtained the signature of late Lachmandas on a blue print of the Plan, without any red lines, under a pretext that the same was required to be annexed to the document (Exhibit-A), which was to be lodged for registration.

7. It is averred that the Plaintiff has no right over the suit terrace except to use the same in common alongwith the other occupants of the building. The Defendants have denied that the Plaintiff is in exclusive possession of the suit terrace. It is averred that the keys of the main door of the suit terrace were always with Lachmandas and since his death; the keys are with the Defendant No.4 and his mother. The Defendants have also disputed the right of the Plaintiff to erect a monsoon shed on the suit terrace.

8. Based on the aforesaid findings the Trial Court framed the following issues:-

“1. Whether this court has jurisdiction to try and entertain this suit?

2. Whether the suit as framed and filed is maintainable?
3. Whether the Plaintiff proves that he purchased the flat on third floor inclusive of terrace attached thereto under an agreement dated 4th September, 1978 as alleged in para 2 of the plaint?
4. Whether the Plaintiff proves that he was in exclusive use and occupation of the suit terrace?
5. Whether the Plaintiff is entitled to the injunction sought and to the restoration of the outer door?
6. What order and decree?"

9. The parties did not press for findings on issues 1 and 2. Upon considering the evidence on record, the learned Judge held that under the registered document at Exhibit-A, the Plaintiff was sold the suit flat admeasuring 800 sq.ft. The premises sold to the Plaintiff under the said document do not include the suit terrace. The learned Judge held that there is conflict in the area mentioned in the document and as shown in the plan. Upon considering the pronouncements of different High Courts on the issue and the recitals of the documents, the learned Judge held that the recitals of the documents, which are specific and unambiguous, would prevail over the area stated in the plan.

10. The learned Trial Judge has further held that though the plan indicates that the suit terrace admeasuring 450 sq.ft. is a part of the premises sold to the Plaintiff, there is absolutely no reference to the

suit terrace in the document at Exhibit-A. On the contrary, clause 13 of the said documents at Exhibit-A indicates that the original owner - Lachmandas had reserved rights to develop the space on the terrace with restricted right to the Plaintiff to use the terrace with other flat owners. The Trial Judge has further observed that reference to the suit terrace in clause 13 is in respect of the suit terrace and not the terrace above the third floor. The learned Judge thus concluded that the suit terrace is not a part of the premises sold to the Plaintiff under the document at Exhibit-A.

11. The learned Judge has recorded a finding that the Plaintiff has not proved his title in respect of the suit terrace. The learned Judge has also observed that the Plaintiff has failed to prove that he was in exclusive possession of the suit terrace. The learned Judge has therefore held that the Plaintiff has no right to carry out any construction over the suit flat. Based on these findings, the learned Trial Judge dismissed the suit. Being aggrieved by the said judgment and decree the Plaintiff has preferred this Appeal.

12. Heard Mr. Kanuga, the learned counsel for the Plaintiff. He submits that the original owner-Lachmandas of the building Agicha

building, which consist of ground plus three floors has 8 flats. In the deed of partition dated 2/5/1961, Lachmandas was allotted two flats on the first floor and one on the third floor with the appurtenant terrace and half of the terrace above the third floor. He submits that said Lachmandas had sold the suit flat along with appurtenant terrace. The property transferred in favour of the Plaintiff has been delineated in the plan annexed to the said registered document at Exhibit A. The said plan amply proves that the suit terrace is an integral part of the property sold to the Plaintiff. He submits that the boundaries of the property transferred in favour of the Plaintiff are well defined and hence the same would prevail over the area mentioned in the document at Exhibit-'A'.

13. He submits that the evidence on record amply proves that the Plaintiff was in exclusive possession of the suit flat. He contends that the learned Trial Judge has failed to appreciate the evidence and that the findings recorded are perverse and erroneous. He has relied upon the decisions in *Maharudrappa Danappa Sonar vs. Lakshman Hanmantappa Jamkhandi AIR 1932 Bombay 449*, *M/s. Roy and Co. And Ors. vs. Nani Bala Dey and Ors. AIR 1979 CALCUTTA 50*, *T. Rajlu Naidu vs. M.E.R. Malak, Dharmakanny Nadar Siviseshamuthu and Ors.*

vs. Mahalingam Nadar Gopalakrishna Nadar and Ors. AIR 1963 MADRAS 147 (V 50 C 55).

14. Mr. Nichani, the learned counsel for the Defendants submits that the recitals in the document at Exhibit-A, which are specific and unambiguous, clearly indicate that under the said document the Plaintiff was sold only the suit flat admeasuring 800 sq. ft. He contends that the area of the premises as stated in the document at Exhibit-A would prevail over the area shown in the plan annexed to the said document. He has relied upon the decision of the Apex Court in ***Nahalchand Laloochand Pvt. Ltd. vs. Panchali Cooperative housing society Ltd. (2010) 9 SCC 536*** to contend that the 'flat' means a separate and self contained set of premises that forms part of the building which is or intended to be used for residence, office, etc. and it would not include Garage, open spaces, etc.

15. I have perused the records the considered the submissions advanced by the learned counsel of the respective parties. The short point falling for my consideration is whether the suit terrace is an integral part of the suit flat sold to the Plaintiff under the document at Exhibit-A.

16. It is not in dispute that Lachmandas, was the owner of the suit flat and suit terrace on the third floor of Agicha House. By a registered document dated 4/9/1978 (Exhibit-A) said Lachmandas sold to the Plaintiff the premises described as a "flat admeasuring 800 sq.ft." whereas the plan annexed to the said document indicates that the flat sold to the Plaintiff is inclusive of the appurtenant terrace admeasuring 450 sq.ft. This is the discrepancy between the document at Exhibit-A and the plan annexed thereto.

17. It is well settled that when there is conflict between the boundaries and the area, normally the description of the boundaries should prevail in preference to the area mentioned in the document for determining the extent of the land conveyed thereunder. However, when the boundaries are vague and not precise and it is clear from the recitals in the document that the intention was to convey the property as per the measurements or area, effect has to be given to the intention and in such circumstances, the boundaries would not prevail over the area. This well settled principle has been reiterated in *Dharmakanny* (supra).

18. In the instant case, a perusal of the registered document at Exhibit-A indicates that the premises sold to the Plaintiff was a flat with definite measurements. The said registered document does not make any reference to the suit terrace and does not indicate that the suit terrace having an area 450 sq.ft. is an integral part of the suit flat. On the contrary, Clause-2 of the document indicates that the purchaser i.e. the Plaintiff would have no right, title and interest beyond the suit flat. Clause 13 of the document further stipulates that the owner shall have right to develop the space on the terrace and that the purchaser shall have no right, title and interest therein, except the use of open terrace like other flat owners. The fact that clause 13 also refers to a common partition wall, which is undisputedly located on the third floor, gives a clear indication that the flat referred to in clause 13 is in fact the suit terrace situated on the third floor and not the terrace situated above the third floor. A holistic reading of the recitals of the document more particularly clauses 2 and 13 of the document at Exhibit-A clearly indicates that the owners intended to sell to the Plaintiff a flat admeasuring 800 sq.ft. and not the suit terrace admeasuring 450 sq.ft., as delineated in the plan which was admittedly signed about a year after execution of the document at Exhibit A. The

Plaintiff therefore cannot claim exclusive right or title in respect of the suit terrace.

19. The fact that the suit terrace is accessed by two doors i.e. one from the passage in use of the Plaintiff and the other from the landing near the common staircase also fortifies that the other occupants also have right to use the suit terrace. Furthermore, it is in evidence that no lock was put on the door near the landing and the second set of keys of the said door were retained by Lachmandas and since his death by the Defendant No.4. These facts negate the contention that the Plaintiff is in exclusive possession of the suit terrace. The Plaintiff is therefore not entitled for the relief of permanent injunction. It is also pertinent to note that in view of clear denial of title of the Plaintiff in respect of the suit terrace, a suit simplicitor for injunction would otherwise not maintainable.

20. Under the circumstances, the findings recorded by the trial Judge are based on the evidence on record. The findings are neither arbitrary nor perverse and hence do not warrant any interference. Hence the appeal has no merits and is accordingly dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)

21. At this stage, the learned Counsel for the Plaintiff states that the interim relief granted by this Court during the pendency of the appeal be extended for a period of three weeks so as to enable her to challenge the judgment. With consent, interim relief if any, granted during the pendency of this appeal is extended for a period of three weeks from the date of uploading of this order.

(SMT. ANUJA PRABHUDESSAI, J.)

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